The Westin Hotel *and* International Union of Operating Engineers, AFL-CIO, Local 20. Case 9-CA-17844

May 19, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on January 8, 1982, by International Union of Operating Engineers, AFL-CIO, Local 20, herein called the Union, and duly served on The Westin Hotel, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 9, issued a complaint on January 27, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on December 18, 1981, following a Board election in Case 9-RC-13742, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 4, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. Subsequently, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On February 8, 1982, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on February 12, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent admits its refusal to bargain, but denies that it thereby violated Section 8(a)(5) and (1) of the Act. In its response to the Notice To Show Cause, Respondent contends that it is not obligated to bargain because the unit for which the Union is certified is inappropriate and that the only appropriate unit is an overall one consisting of all motel/restaurant employees, excluding all office clerical employees, supervisors and all professional employees. Respondent urges that by limiting the unit to all engineering and maintenance department employees, the Board departed from both established Board law and the weight of the evidence developed in the record. Respondent also contends that the issues it wishes to litigate in this unfair labor practice proceeding were not properly litigated in the prior representation proceeding.

Counsel for the General Counsel argues that Respondent's contentions are without merit as they raise issues which were presented to, and decided by, the Board in the underlying representation proceeding.[2]

A review of the record herein, including the record in Case 9-RC-13742, reveals that following a hearing before a hearing officer of the National Labor Relations Board, the Regional Director for Region 9 issued a Decision and Direction of Election in which the appropriate unit for collective bargaining was found to consist of:

> All employees employed by the Employer in its maintenance and engineering department at its Cincinnati, Ohio facility, excluding all other employees and all professional employees, guards and supevisors as defined in the Act.

Thereafter, on June 5, 1981, the Hotel, Motel, Restaurant Employees and Bartenders Union, Local 12, Intervenor in Case 9-RC-13742 (hereafter

[1] Official notice is taken of the record in the representation proceeding, Case 9-RC-13742, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] General Counsel contends that all issues raised by Respondent's answer were decided in the representation proceeding and that he is entitled to a summary judgment as a matter of law. In this regard he moves to strike portions of Respondent's answer, contending that such are contrary to the facts admitted and the official record. While, for the reasons stated herein, we find that Respondent's answer and memorandum in opposition to Motion for Summary Judgment do not present a meritorious defense to the allegations of the complaint, we do not believe such defenses should be stricken since they constitute an endeavor by Respondent to preserve a position, albeit, in our view, erroneous one. See *Rod-Ric Corporation*, 171 NLRB 922 (1968). The motion to strike is denied.

called the Intervenor) and Respondent filed separate motions for reconsideration with the Regional Director, contending that the unit in which the election was directed is inappropriate as a matter of law and of the evidence developed in the record. On June 9 and 10, 1981, the Intervenor and Respondent, respectively, filed requests for review with the Board in Washington, D.C., in which they reiterated the contentions made in their separate motions for reconsideration. On June 16, 1981, the Regional Director for Region 9 issued an order denying motion for reconsideration in which he concluded that an insufficient basis existed for a reconsideration of the Decision and Direction of Election. However, on June 26, 1981, the Board by telegraphic order granted the request for review filed by Respondent and the Intervenor. An election was conducted by secret ballot on June 30, 1981, by an agent of the Board, pursuant to the terms of the Decision and Direction of Election, and the ballots cast were thereafter impounded in conformity with the Board's procedures. On September 28, 1981, the Board issued a Decision on Review in Case 9-RC-13742 in which it adopted the Regional Director's Decision and Direction of Election, and remanded the proceeding to the Regional Director for the purpose of opening and counting ballots in the election which had already been held and for further appropriate action. On October 8, 1981, Respondent filed a motion to reconsider and request for oral argument. On October 9, 1981, the Intervenor filed a motion for reconsideration with the Board. On November 30, 1981, the Board issued an order denying motion, finding that Respondent's motion lacked merit and contained nothing previously considered by the Board. In its order, the Board also denied Respondent's request for oral argument.[3]

[3] Though not raised as an issue by any of the parties, we found from a review of the record that the Board through inadvertence has never ruled on the Intervenor's October 9, 1981, motion for reconsideration in the underlying RC case. We have reviewed the Intervenor's motion and find that it contains no new arguments, evidence, or contentions not already considered by and rejected by the Board in Respondent's parallel motion for reconsideration of October 8, 1981. Further, although the Intervenor, in its motion, requested that the R case be remanded to the Regional Director for the purpose of taking evidence on the issue of area bargaining practice, the Intervenor did not allege any newly discovered or previously unavailable evidence or special circumstances which warrant granting this request. Therefore, having duly considered the matter, we find that the Intervenor's motion lacks merit and contains nothing not previously considered by the Board. Further, the Intervenor's request to remand the case to the Regional Director for purposes of reopening the record is lacking in merit since the Intervenor had adequate opportunity to present this evidence at the representation hearing and failed to do so. Accordingly, we have issued an order dated May 12, 1982, denying Intervenor's motion for reconsideration. Since no party has suffered, or claimed that it suffered, any prejudice based on our failure to make a ruling on the Intervenor's motion at an earlier time, we find that our inadvertence—now remedied—does not preclude our granting this Motion for Summary Judgment.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Since on or about March 19, 1981, at which time Respondent commenced its operations, and continuing to date, Respondent, a Delaware corporation, with an office and place of business in Cincinnati, Ohio, has been engaged in the operation of a hotel and restaurant complex. Since on or about March 19, 1981, Respondent, in the course and conduct of its business operations, has derived gross revenues in excess of $500,000. During the same period, Respondent, in the course and conduct of its business operations, has purchased and received at its Cincinnati, Ohio, facility products, goods, and materials valued in excess of $5,000 directly from points outside the State of Ohio.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, AFL-CIO, Local 20, is a labor organization within the meaning of Section 2(5) of the Act.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All employees employed by [Respondent] in its maintenance and engineering department at its Cincinnati, Ohio facility, excluding all other employees and all professional employees, guards and supervisors as defined in the Act.

2. The certification

On June 30, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 9 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on December 18, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about December 22, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 4, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since January 4, 1982, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. The Westin Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, AFL-CIO, Local 20, is a labor organization within the meaning of Section 2(5) of the Act.

3. All employees employed by the Employer in its maintenance and engineering department at its Cincinnati, Ohio facility, excluding all other employees and all professional employees, guards and supervisors as defined in the Act constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since December 18, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 4, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent

has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, The Westin Hotel, Cincinnati, Ohio, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, AFL-CIO, Local 20, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All employees employed by the Employer in its maintenance and engineering department at its Cincinnati, Ohio facility, excluding all other employees, and all professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Cincinnati, Ohio, facility copies of the attached notice marked "Appendix."[5] Copies of said notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, AFL-CIO, Local 20, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All employees employed by the Employer in its maintenance and engineering department at its Cincinnati, Ohio facililty, excluding all other employees and all professional employees, guards and supervisors as defined in the Act.

THE WESTIN HOTEL